FILE COPY

IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted] 47

JAY GIACCIO,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

On Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

Appellant, Jay Giaccio, prays that your Honorable Court note its probable jurisdiction, require briefs and oral argument on the merits and reverse the judgment of the Supreme Court of Pennsylvania entered in the above entitled case. In support thereof, appellant submits the following Jurisdictional Statement.

OPINIONS BELOW.

The majority and dissenting opinions of the Supreme Court of Pennsylvania are reported at 415 Pa. 139, 202 A. 2d 55 (1964), and are attached hereto as Appendices A and B, respectively. The majority and dissenting opinions of the Superior Court of Pennsylvania are reported at 202 Pa. Super. 294, 196 A. 2d 189 (1963), and are attached hereto as Appendices C and D, respectively. The opinion of the trial court is reported at 30 Pa. D. & C. 2d 463 (Q. S. Chester 1963), and is attached hereto as Appendix E.

JURISDICTION.

Appellant was indicted for a misdemeanor and tried before a jury. He was acquitted. As a part of its verdict, however, the jury assessed the costs of prosecution in the amount of $230.95 against him pursuant to the Act of March 31, 1860, P. L. 427, § 62; PA. STAT. ANN., tit. 19, § 1222.[1]

Subsequently, appellant filed a Motion for Relief of Costs, which, following two hearings, was granted. The trial court held that the Act of 1860 was unconstitutional as applied to an acquitted defendant on the three federal grounds presented to this Court. The trial court's judgment and order were subsequently reversed on appeal, with both the Superior and Supreme Courts of Pennsylvania upholding the Act of 1860 against the specific constitutional objections raised initially in the trial court.

The judgment of the Supreme Court of Pennsylvania was entered on July 6, 1964. A Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Pennsylvania on October 2, 1964. On November 24, 1964, the Supreme Court of Pennsylvania granted an extension of the time under Rule 13 to docket the appeal and file the Jurisdictional Statement until January 15, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *Winters v. New York*, 333 U. S. 507; *Lanzetta v. New Jersey*, 306 U. S. 451.

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1. Hereinafter the "Act of 1860".

STATUTE INVOLVED.

The Act of 1860 provides:

"In all prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant, shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return of verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

QUESTIONS PRESENTED.

The questions presented are substantially those affirmed by the trial court but subsequently rejected by two State appellate courts:

1. Is the Act of 1860 unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution, in that it permits punishment

(a) without any standards prescribed by the statute itself;

(b) on a finding that defendant has been guilty of "some misconduct" or "reprehensible misconduct" which "misconduct" is not otherwise defined or identified at any time, either prior to or during the criminal proceedings?

2. Does the combined effect of the procedural due process violations arising from operation of the Act of 1860 and the mere fact that the Act permits punishment of an innocent person, contrary to every other English speaking jurisdiction where the practice was found to have been considered, violate the fundamental fairness required of all criminal proceedings by the Fourteenth Amendment due process clause?

3. Does the Act of 1860 violate the "equal protection of the laws" embodied in the Fourteenth Amendment because it discriminates against defendants in misdemeanor cases by imposing upon them a burden from which defendants in *both* felony cases and cases involving summary offenses are specifically protected in the absence of any rational basis for making such a distinction?

STATEMENT OF THE CASE.

Appellant was tried in the Court of Quarter Sessions in Chester County, Pennsylvania, on two bills of indictment charging him with unlawfully and wantonly pointing and discharging a firearm at each of two persons. The alleged offenses were misdemeanors and violations of the Act of June 24, 1939, P. L. 872, § 716; PA. STAT. ANN. tit. 18, § 4716. The maximum penalty for the indicted offense was a fine not exceeding $500 or imprisonment not exceeding one year or both.

At trial—at which appellant presented his defense *in propria persona*—a verdict of not guilty was directed by the trial court as to one bill (No. 226, September 1961) and the jury placed the costs of prosecution upon the County. As to the second bill (No. 225, September 1961)—in issue here—the jury returned a verdict of not guilty but ordered appellant to pay the costs of the prosecution in the amount of $230.95 pursuant to the Act of 1860. The court, thereupon, ordered defendant to pay costs or give security within ten days or stand committed to jail unless he complied therewith. Having so posted security, defendant filed a Motion to be Relieved of Payment of Costs on the ground, *inter alia*, that the imposition of costs was contrary to law.

Defendant initially argued his Motion *in propria persona* on April 27, 1962. While the Court held the matter under advisement, counsel entered their appearance for appellant and filed a Petition for Re-Hearing. The Petition stated, *inter alia*, that "the instant proceedings raise fundamental issues under the United States and Pennsylvania Constitutions which are sufficiently complex to prevent an adequate presentation by the defendant who is not trained in the law." A rehearing was granted and counsel thereupon argued the three basic federal constitutional questions which are presented in this appeal. On January

12, 1963, the trial court sustained appellant's contentions as to all three and held that the Act of 1860 was unconstitutional as applied to an acquitted defendant.

On December 12, 1963, the Superior Court of Pennsylvania reversed the order of the trial court and reinstated the sentence. The majority opinion was written for the Court by Judge Robert E. Woodside. Judge Gerald F. Flood filed a dissenting opinion which declared that the Act of 1860 clearly violates federal due process.

On appeal to the Supreme Court of Pennsylvania, the order of the Superior Court was affirmed with Mr. Justice Samuel J. Roberts writing the opinion for the four-Justice majority (two Justices did not take part in the consideration of the case). Mr. Justice Herbert B. Cohen filed a dissenting opinion stating that he would adopt the opinion of Judge Flood of the Superior Court.

Appellant filed a timely Notice of Appeal to the Supreme Court of the United States. Having posted the necessary security, defendant is not presently confined to jail.

GROUNDS FOR SUBSTANTIAL NATURE OF FEDERAL QUESTIONS PRESENTED.

I. The Act of 1860 Is Void for Vagueness Because It Lacks Any Statutory Criteria Whatsoever for Its Enforcement and Because, as Construed, It Permits the Punishment of Those—Such as Appellant—Who Have Been Adjudged to Be Guilty of No More Than "Impropriety of Conduct", "Reprehensible Conduct" or "Some Misconduct".

A. The Act of 1860 Is a Punitive Measure; It Forcibly Deprives a Defendant of His Property or His Liberty if He Does Not Pay.

The majority opinion of the Supreme Court of Pennsylvania concluded that a discussion of due process protections was academic to this case because the Act of 1860 was "civil" rather than "penal" in character[2] (3a-5a). Little light would be shed on this case by appellant making a lengthy argument that the Act of 1860 is indeed "penal". The essential point is simply this: the statute imposes a penalty-burden upon defendants in criminal cases. As Judge Flood correctly pointed out in his dissenting opinion in the Superior Court, 202 Pa. Super. at 312 (26a):

> "No amount of dialectic can alter the fact that this statute provides that an accused may go to jail without having been convicted of any crime—indeed after having been acquitted of the only crime of which he was charged."

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2. In reaching this result the Court overruled its own pronouncements dating back as far as 1818. In *Commonwealth v. Tilghman*, 4 S. & R. 127, 129 (Pa. 1818), Mr. Justice Gibson stated, "I grant, that a statute imposing costs, is penal in nature and must be construed strictly . . ." In *Clemens v. Commonwealth*, 7 Watts 485 (Pa. 1838) the Court said, "The statute which enables a grand or petit jury to punish with costs is penal, and to be strictly construed."

The liability imposed under the Act of 1860—commitment to jail—is incurred only in criminal cases and as an adjunct of criminal law enforcement. The liability is only incurred, so Pennsylvania's state courts have said,[3] when defendants are "guilty of misconduct".

This punitive character is conclusively revealed in the following portion of the trial judge's charge in this case as to the application of the Act of 1860 (The entire charge relevant to costs is attached hereto as Appendix F.):

> "Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been *guilty* of *some misconduct* less than the offense which is charged but nevertheless *misconduct* of some kind as a result of which he should be required *to pay some penalty short of conviction,* the cost of prosecution may be placed upon him if his misconduct has given rise to the prosecution." [Emphasis supplied.]

See also, *Lowe v. Kansas,* 163 U. S. 81 (requirement that prosecutor pay costs must meet the requirements of procedural due process); *Commonwealth v. Franklin,* 172 Pa. Super. 152, 92 A. 2d 272 (1952) (requirement that *acquitted* defendant post "peace" bond must comply with due process).

B. The Act of 1860 Lacks Any Statutory Criteria for Its Enforcement.

A statute imposing liability of this character must contain standards of guilt. The Act of 1860 has none. Without such standards it is void for vagueness. See *Baggett v. Bullitt,* 377 U. S. 360, and cases cited therein; *Lanzetta v. New Jersey,* 306 U. S. 451.

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3. E.g., *Commonwealth v. Tilghman,* 4 S. & R. 127 (Pa. 1818); *Commonwealth v. Daly,* 11 Pa. Dist. 527 (Q. S. Clearfield 1902); *Commonwealth v. King,* 33 Pa. D. & C. 2d 235 (Q. S. Allegheny, 1963).

The "void for vagueness" doctrine is a command of due process; it rests on the following principles, both of which are lacking in the Act of 1860:[4] (a) if the state proposes to impose liability for some conduct it must give fair warning to the public by defining, as much as possible, the prohibited conduct;[5] and (b) likewise there must be a standard sufficiently precise to guide the court and jury so that there will not be unfair discrimination or "*ex post facto*" treatment in the enforcement of the statute.[6]

The absence of a standard also prevents an appellate court from ascertaining what act the jury sought to punish and thereby effectively negating any chance of proper appellate review. It is possible that a jury would punish a defendant for a perfectly legal or, even more serious, a constitutionally protected act. Yet, the appellate court has no way of knowing whether either was involved.

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4. See Note, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 68 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. Q. 195 (1955).

5. Mr. Justice Frankfurter, dissenting in *Winters v. New York*, 333 U. S. 507, 524, stated:

"Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of 'due process of law.' The legal jargon for such failure to give forewarning is to say that the statute is void for 'indefiniteness.'"

6. Note, Amsterdam, 109 U. OF PA. L. REV. 67 at 93:

"Many legal responsibilities may be made to turn—as many common-law duties have traditionally turned—upon the 'reasonableness' of conduct as viewed by some trier of fact. But it is in this realm, where the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck *ad hoc* on the basis of a subjective evaluation—as also in the realm of more obviously absolute official discretion—that there exists the risk of continuing irregularity with which the vagueness cases have been concerned."

In *Commonwealth v. King*, 33 Pa. D. & C. 2d 235 (Q. S. Allegheny 1963), defendant was indicted and charged with the crime of libel in contravention of § 412 of the Act of June 24, 1939, P. L. 872; PA. STAT. ANN., tit. 18, § 4412. The jury initially returned a verdict of not guilty without disposing of the costs but was sent back for further consideration as to that issue. It thereupon assessed costs against defendant pursuant to the Act of 1860. Subsequently, the Court rejected defendant's contention that the Act violated the Fourteenth Amendment and denied a motion in arrest of judgment, holding that costs may be assessed against an acquitted defendant when his conduct is "serious and reprehensible." Yet, the act of defendant's which the jury sought to punish may very well have been one constitutionally protected by the rule of *Garrison v. Louisiana*, — U. S. —, 33 U. S. LAW WK. 4019, decided this Term, which expressly held that the First Amendment strongly restricts the power of states to impose sanctions for *criminal* libel. An appellate court reviewing the *King* case could not tell.[7] This absence of statutory criteria makes the Act of 1860 unconstitutionally vague.

C. The Act of 1860 Unconstitutionally Permits Punishment for "Reprehensible" or "Improper" Conduct or, as in the Charge in This Case, for "Some Misconduct".

A statute invalid under the "void for vagueness" doctrine is unconstitutional either because on its face or as construed by the courts, it offers no standard of conduct that is possible to know: *Winters v. New York*, 333 U. S. 507; *American Seeding Machine Co. v. Kentucky*, 236 U. S. 660; *International Harvester Co. v. Kentucky*, 234 U. S. 216.

The authoritative, long accepted Pennsylvania interpretation of the Act of 1860 comes from a case involving the Act of 1804, 4 Laws of Pa. 204 (Smith 1810), a prede-

7. Cf. *Jackson v. Denno*, 378 U. S. 368.

cessor which was substantially identical in wording to the Act of 1860.[8]

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8. The statutory history of the Act of 1860 reveals a picture not of rational legislation, reflecting considered legislative judgment, but, on the contrary, a quixotic, unexplainable law which may have been the result only of legislative accident.

In 1791, in an act entitled "A Supplement to the Penal Laws of this "State," the Pennsylvania Assembly declared that (1) in cases of "outlawry"; (2) in all cases in which the grand jury "returned ignoramus" on bills of indictment; and (3) in all cases "where any person shall be brought before a Court . . . on the charge . . . of having committed a crime, and such charge, upon examination, shall appear to be unfounded," the costs should fall on the county. 3 Laws of Pa. 37 (Smith 1810).

Subsequently, in 1797, the Assembly clarified the law: "Whereas," (it declared) ". . . a party . . . acquitted [of an indictable offense] is equally liable to costs of prosecution as if he were convicted, *which operates injustice, and a punishment to the innocent* . . . Be it therefore enacted . . . that . . . all costs accruing on all bills . . . charging . . . [any] indictable offense, shall, if such party be acquitted by a petit jury. . . be paid out of the county stock . . . ." 3 Laws of Pa. 281 (Smith 1810). (Emphasis added.)

This enactment plainly demonstrates an original legislative intent in Pennsylvania to avoid what was evident even then, and what should be equally evident now, that the imposition of costs on acquitted defendants is a harsh and unjust practice "as punishment" unfairly imposed on innocent persons. In 1804 the Assembly enacted the following statute, 4 Laws of Pa. 204 (Smith 1810) (which was never signed by the Governor but became law nevertheless because it was returned by him too late to avoid becoming law):

> "WHEREAS experience has proved, that the laws obliging the respective counties to pay the costs of prosecutions, in all criminal cases, where the accused is or are acquitted, have a tendency to promote litigation: inasmuch as they enable restless and turbulent people to harass the peaceable part of the community, with trifling, unfounded, or malicious prosecutions at the expense of the public: Therefore,
>
> "SECT. I. *Be it enacted by the Senate and House of Represenatives of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That from and after the first of November next, in all prosecutions, cases of felony only excepted, if the bill or bills of indictment shall be returned 'ignoramus' the grand jury who returns the same shall decide and certify on such bill, whether the county or the prosecutor shall pay the costs of prosecution; and

Justice Gibson, in *Commonwealth v. Tilghman, supra,* 4 S. & R. 126 (Pa. Supreme Ct. 1818) (the first reported appellate case in Pennsylvania to involve the rule that an acquitted defendant may be forced to pay costs), explained the rationale of the act and the focal point of its provisions:

> ". . . a defendant, acquitted of actual crime, but *whose conduct may have been reprehensible* in some respects, or whose *innocence may have been doubtful.* . . . ."

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in all cases of acquittals, by the petit jury, on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county or the prosecutor, *or the defendant or defendants,* shall pay the costs of prosecution; and the jury so determining, in case they direct the prosecutor to pay the costs, shall name him or them in their return or verdict. [Emphasis supplied.]

"SECT. II. *And be it further enacted by the authority aforesaid,* That whenever any jury shall determine, as aforesaid, that the prosecutor or prosecutors shall pay the costs, the court in which the said determination shall be made, shall forthwith pass sentence to that effect, and order him, her or them committed to the gaol of the county until the costs are paid, unless he, she or they give security to pay the same within ten days."

From the context and expressed purposes of the act, it seems clear that the key to the statute lies with the words "or the prosecutor," and that the legislature was primarily concerned with ill-founded prosecutions and the desirability of relieving the county of *those* costs. See *Commonwealth v. Harkness,* 4 Binn. 194, 195-96 (Pa. Supreme Ct. 1811). In light of this, it seems that the words "or the defendant" (italicized above) were inserted either by mistake or without clear recognition of their ramifications. For the act, read literally, as, of course, it has been, reverted to a practice which only a few years before had been repudiated by the legislature as "unjust" and which was even then constitutionally forbidden by other state constitutions. See, e.g., Fla. CONST. Declarations of Rights § 14; Ga. CONST. art. I, Bill of Rights § 1, para. X; Miss. CONST. art. 14, § 261; N. C. CONST. art. I, Declaration of Rights § 11.

The power of the jury to assess costs against innocent misdemeanor defendants was continued in the same language in the Act of 1860. Presumably the legislature, in enacting this statute, simply swept together all the existing legislation on the subject—without consideration of its merits.

"The judgment is not on the indictment, but on something collateral to it. The defendant is not punished for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though, on account of something, of *which he was not indicted*, some *impropriety of conduct*, or *ground of suspicion*, which the verdict of the jury has fastened on him. . . ."

"There may, I apprehend, be acts, such as certain kinds of fraud, that are *offensive to morality*, that nevertheless are not indictable. . . ." [Emphasis supplied.]

This characterization has been repeated many times.[9] It was also the basis of the Court's charge in this case. See the relevant portion of charge, p. 8, *supra*.

Most recently, the standard was made even less definite by the majority opinion of the Superior Court in this case, 202 Pa. Super. at 308 (21a-22a):

"There are endless situations in which the jury might find that the defendant's improper conduct was responsible for the prosecution even though he was not guilty of the crime charged. It is not unjust for a jury to impose costs upon a defendant where the defendant may have clearly committed the offense charged but was able to raise a reasonable doubt that the offense was brought within the statute of limitations; or where the prosecutor and the defendant involved in a fistfight were guilty of conduct not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs; or where the defendant in a 'drunken driving' case drank and then drove while in that twilight zone that exists at some stage of the drinking; or where defendants charged with adultery registered at a hotel as husband and

9. *E.g., Baldwin v. Commonwealth*, 26 Pa. 171 (1856); *Commonwealth v. Daly*, 11 Pa. Dist. 527 (Q. S. Clearfield 1902).

wife but convinced the jury they had not actually committed adultery." [10]

These Pennsylvania cases demonstrate that the statute as construed offers no clear standard of guilt, that it is not "fenced in" sufficiently to give notice of what is to be punished.

In *Baggett v. Bullitt*, 377 U. S. 360, decided last Term, the statute involved required an employee of the State of Washington, as a condition of his employment, to take an oath that he was not a "subversive person". The act was struck down by this Court which found the oath framed in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." 377 U. S. at 367.

In *Lanzetta v. New Jersey*, 306 U. S. 451, the statute provided for the fine or imprisonment of "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or any other state . . ." Such person was declared to be a "gangster" and subject to punishment for that reason. After an examination of the meaning of "gang" and

10. The harmful effect of Judge Woodside's majority dicta is vividly illustrated by a portion of Judge Flood's dissenting opinion in the Superior Court, 202 Pa. Super. at 313 (27a):

> "The statute here condemns no act or omission. The majority points to the common law crimes, punishable under our statutes but defined only by the common law, i.e., decisions of the courts. The precise common law definitions of such crimes, e.g., murder, rape, burglary or arson, could not contrast more sharply than they do with the majority's attempt to define what is punishable here —conduct 'related to the prosecution', 'reprehensible conduct', conduct 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal division of the costs', the conduct in the twilight zone between drunken driving and something less or something reprehensible that does not constitute a crime, such as registering falsely at a hotel as husband and wife."

"gangster," this Court held the statute invalid. The statute condemned no act or omission; the terms it employed to indicate what it purported to punish were, in the eyes of the Court, so "vague and uncertain" as to be "repugnant" to due process.

The *Baggett* and *Lanzetta* cases did not turn simply on the elusive meaning of the words "subversive person" or "gang". Void for vagueness issues are not problems in semantics. The *Lanzetta* statute was obviously an attempt to authorize the harassment—the punishment of individuals suspected of wrongdoing—suspected of some sort of misconduct which was deliberately or inexcusably left undefined. Justice Frankfurter, speaking of *Lanzetta* (in *Winters v. New York*, 333 U. S. 507, 540 (dissenting opinion), identified the rationale of that decision, the vice of vagueness for which the statute was struck down, in the following terms:

> "Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable . . . although not chargeable with any particular offense."

This, then, is the gist of *Lanzetta* and the very same evil at which this Court struck in declaring unconstitutional the statute involved in *Baggett*. It is the rationale of many similar cases, old and recent, such as *Stoutenburgh v. Frazier*, 16 App. D. C. 229 (D. C. Cir. 1900), and *People v. v. Alterie*, 356 Ill. 307, 190 N. E. 305 (1934), and the cases cited with approval in *Baggett v. Bullitt, supra*, 377 U. S. at 367. We submit that the Act of 1860 has precisely the same evil.

It might be noted that by invalidating *this* act, this Court need not hold that the legislature may enact no statute imposing costs on acquitted defendants. We might concede, *arguendo*, that situations can be conceived in which it would not be unfair to require acquitted defendants to pay costs. But these situations must be precisely de-

fined; the elements of this punitive liability must be adequately spelled out. The present statute can be used to permit a jury, unrestrained, to punish any sort of conduct or misconduct which it may, *ex post facto,* decide should be penalized.

D. If Allowed to Stand, the Majority Opinions Below Will Leave State Trial Courts in Pennsylvania With a Completely Unconstitutional Interpretation of the Act of 1860 and Will Doubtless Result in an Even Broader Use of Its Punitive Provisions in the Future.

The impact of the decision here will extend well beyond the present case. In *Commonwealth v. Welsh,* Q. S. Bucks Co. Pa., Nov. Term, 1962, Nos. 174-175, defendant was indicted and charged with the misdemeanor of "macing", in contravention of the Act of April 6, 1939, P. L. 16, § 1; PA. STAT. ANN., tit. 25, § 2374. Although acquitted by a jury, defendant was assessed costs in the amount of $2,098.59. The act under which the defendant was indicted calls for a maximum fine of $1,000 or a one-year prison term or both. Defendant has subsequently filed a Motion In Arrest of Judgment, raising substantially the same federal questions presented in this case. The motion is being held under advisement pending outcome of the instant case.

Commonwealth v. King, 33 Pa. D. & C. 2d 235 (Q. S. Allegheny 1963), p. 10, *supra,* has been appealed to the Superior Court of Pennsylvania; however, upon application by appellant, argument has been deferred pending the outcome of this case.

Although appellant has no definitive statistics, it is his belief that costs are assessed against acquitted defendants in most Pennsylvania counties. However, the number of reported cases is relatively few, apparently because defendants are so relieved at being acquitted of the indicted

offense that they would prefer to pay the costs rather than engage in additional litigation.

Unless this Court notes its probable jurisdiction, hears argument and reverses, the "standards" of "conduct related to the prosecution" and "reprehensible conduct" contained in the Superior Court's majority opinion will find their way into jury charges of future Pennsylvania cases just as "guilty of some misconduct" and "misconduct of some kind" became part of the charge in this case (39a). The inescapable result of these dicta, if not reversed, will be a use of the Act of 1860 over a broader factual scale in Pennsylvania in the coming years.[11]

II. The Act's Procedural Unfairness and Its Punishment of Innocent Persons Clearly Deprive Appellant of Due Process of Law.

Due process of law is a guarantee of fundamental fairness. The Act of 1860 falls short of that standard in two ways. It is unconstitutional not only because it sanctions the punishment of innocent persons, but equally because of the method by which it permits "guilt" to be established.

A. The Act of 1860 Is Unfair and Violates Due Process in a Procedural Sense Because:

(1) It is unconstitutionally vague—it is utterly lacking in standards defining the proscribed conduct by which the determination of guilt may be made. (See Point I, *supra.*)

(2) Although it permits the imposition of a punitive sanction, it nevertheless strips the defendant of his right to defend against this punishment by failing to provide him with the requisite notice of the precise misconduct upon which liability is to be founded. *In re Oliver,* 333 U. S. 257.

11. It is not without significance to note that the two cases awaiting the outcome here—*Welsh* and *King*—involve conduct related to public affairs and present the real possibility that the defendants were punished for constitutionally protected action.

(3) It fails to provide a hearing *on the issue the jury is to determine.* The only hearing contemplated is the hearing on the crime charged in the indictment.[12] Therefore, since the evidence is limited to that charge, other defense evidence which would be relevant only to the imposition of costs under the Act of 1860 may be barred on the ground that it is not relevant to the indictment. This failure to afford the defendant a reasonable opportunity to defend himself constitutes a denial of due process of law. *In re Oliver, supra.*

(4) It relieves the prosecution of the burden of proving those elements which it must prove to establish the requisite "misconduct" beyond a reasonable doubt. It is fundamental that due process in a criminal proceeding includes the right to be deemed innocent until proven guilty beyond a reasonable doubt. *Leland v. Oregon,* 343 U. S. 790, 802-03 (Frankfurter, J., dissenting); *Brinegar v. United States,* 338 U. S. 160, 174 (dictum); *Coffin v. United States,* 156 U. S. 432, 453-56 (dictum). Although the prosecution may have the advantage of reasonable presumptions,[13] nevertheless, the basic burden always remains upon the prosecution.

Each one of these defects, we believe, is sufficient to require the invalidation of the Act of 1860. But when taken cumulatively, they demonstrate beyond all doubt that the statute, as now written and enforced, is so lacking in procedural due process that it is patently unconstitutional.

The foregoing defects make it easily possible that a person entirely innocent of wrongdoing in fact can be punished (and have a court "pass sentence" upon him). Beyond this, the statute by its terms contemplates the imposi-

12. For a correct analysis of these practical procedural aspects, see Judge Flood's opinion, 29a, *infra.*

13. Compare *Tot v. United States,* 319 U. S. 463 with *Leland v. Oregon,* 343 U. S. 790.

tion of this penalty upon a person who has been acquitted of the only crime with which he has been charged. This in itself is contrary to fundamental fairness.

B. The Act of 1860 Violates Due Process Because It Imposes Punishment (Whether or Not We Characterize It as "Criminal Liability") on Men Who Are Admittedly Innocent in the Eyes of the Law. This Is Abhorrent to the Basic Principles of Justice as Guaranteed by the Fourteenth Amendment.

A determination as to the limits of due process is aided by reference to the law elsewhere: is this practice followed, or, conversely, condemned, in jurisdictions which share the same basic concepts of criminal justice? See *Leland v. Oregon*, 343 U. S. 790, 798;[14] *Rochin v. California*, 342 U. S. 165; *Adamson v. California*, 332 U. S. 46.

At common law—in England in the 17th and 18th centuries—costs lay where they fell. Innocent defendants were never required to pay their prosecutors' costs. See, Archbold, *Pleading and Evidence in Criminal Cases* 161 (1834 ed.); 1 Bishop, *New Criminal Procedure* §§ 1313, 1317 (1895 ed.); Note, *Criminal Costs Assessment in Missouri—Without Rhyme or Reason*, 1962 WASH. U. L. Q. 76-77. In England today, not only are costs not imposed upon acquitted defendants, but *precisely the opposite*, there is provision for the award of expenses properly incurred in carrying on their defense. Costs in Criminal Cases Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c.48 (1952). See Note, 1962 WASH. U. L. Q. 76, 77-78.

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14. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934)." *Leland v. Oregon, supra* at 798.

The federal procedure permits costs to be taxed only in the case of a conviction: 28 U. S. C. § 1918 (1958). Also, several states have statutory provisions on the subject (full texts of which are attached hereto as Appendix G), all of which protect acquitted defendants from the imposition of costs. The Act of 1860 reflects a practice which has been condemned in other states. See, *e.g., Arnold v. State,* 76 Wyo. 445, 306 P. 2d 368 (1957); *Childers v. Commonwealth,* 171 Va. 456, 198 S. E. 487 (1938); *State v. Brooks,* 33 Kan. 708, 7 Pac. 591 (1885); *Biester v. State,* 65 Neb. 276, 91 N. W. 416 (1902). Although none of these cases specifically involved a statute or order imposing costs on an acquitted defendant—for, we believe, in no state has the practice ever been authorized—nevertheless, in each case the court, by the way of dicta, indicated that costs should never be so imposed. As indicated, Note 7, *supra,* the practice is constitutionally forbidden in at least four states.

We believe no other jurisdiction imposes costs on acquitted defendants. Our research—portions of which is indicated above—is admittedly not exhaustive; but we find no authority for the practice in any of the encyclopedias or treatises: see, *e.g.,* 1 Bishop, *New Criminal Procedure* §§ 1313, 1317 (1895 ed.); 14 Am. Jur., *Costs* § 107 (1938); 20 C. J. S., *Costs* § 437 (1940). All of the authorities found either prevented or condemned the practice.

It is said, however, that in Pennsylvania "at common law" the defendant bore the costs of a prosecution. E.g., *Commonwealth v. Tilghman,* 4 S. & R. 126, 127 (Pa. Supreme Ct. 1818); Kessler, *Criminal Procedure in Pennsylvania* 235 (1961). Beyond Justice Gibson's statement in *Tilghman, supra,* upon which later dicta seem to rely, we have found no case decided prior to the enactment of statutes dealing with the subject which demonstrate the common law practice in Pennsylvania. The history in Pennsylvania indicates that its adoption may even have been accidental; in any event, the history hardly supports the idea that the practice was carefuly judged as fair.[15]

15. For a history of the Act, see Note 7, *supra.*

III. The Act of 1860 Singles Out Defendants Acquitted of a Misdemeanor by a Jury and Fastens a Peculiar Penalty Upon Them—Yet Other Pennsylvania Costs Statutes Specifically Protect Defendants Acquitted of Both Felonies and Summary Offenses From Similar Penalties; Such Is a Denial of the "Equal Protection of the Laws" Guaranteed by the Fourteenth Amendment.

The Act of 1860 permits a jury to assess costs upon a defendant acquitted of the commission of a misdemeanor. Pa. Stat. Ann. tit. 19, § 1221, as construed, directs that no costs shall be imposed on a defendant found innocent in a summary proceeding. Pa. Stat. Ann. tit. 19, § 1223, which derives from the Act of 1797, 4 Laws of Pa. 204 (Smith 1810) wherein it had been declared that the imposition of *any* costs on an acquitted defendant was "unjust," deals with felonies and provides that costs, in the case of acquittals, shall be paid only by the county.

The distinction between the "improper conduct" which leads to an indictment for a misdemeanor and which, under the Act of 1860, permits the imposition of punishment, i.e., costs, and the "improper conduct" which leads to an indictment for a felony or a summary offense and which, under 1221 or 1223, is not punishable by the imposition of costs in the event of an acquittal, is simply not rational. Such distinction is not the result of the application of a reasonable standard.

The peculiar penalty for "improper conduct" which is sanctioned by the Act of 1860 is not, vis-à-vis Pa. Stat. Ann. tit. 19, § 1221 and § 1223, justified by practical exigencies nor by the dictates of experience. This is not a matter of "degrees of evil" which were held constitutional in *Truax v. Raich*, 239 U. S. 33. This penalty is the product of historical accident and only serves to impose upon a person suspected of a lesser offense a burden from which a person charged with a more serious offense or, indeed, a less seri-

ous one has been expressly relieved. Such is an unreasonable classification, a denial of the equal protection of the laws, and is, therefore, unconstitutional. *Skinner v. Oklahoma,* 316 U. S. 535.

CONCLUSION.

For the reasons stated above, this Court should note its probable jurisdiction, require briefs on the merits and oral argument and reverse the judgment and order of the Supreme Court of Pennsylvania.

Respectfully submitted,

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January 15, 1965.

APPENDIX "A".

MAJORITY OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Mr. Justice Musmanno and Mr. Justice Jones did not take part in the consideration of the case.

Opinion by Mr. Justice Roberts, July 6, 1964:

In the context of current interpretations of the Constitutions of the United States and of this Commonwealth, we are asked to declare invalid the Act of March 31, 1860, P. L. 427, § 62, 19 P. S. § 1222,[1] which permits the imposition by a jury of costs on defendants acquitted of misdemeanors.[2] The Act specifically provides: "In all

1. This Act was taken from the Act of Dec. 8, 1804, 4 Sm. 204, §§ 1, 2, and the Act of April 12, 1859, P. L. 528.

2. The Superior Court, in this case, observed that the validity of the Act has been sustained by it and by this Court on numerous occasions. Judge Woodside, for the majority, noted:

"The validity of a statute imposing costs upon an acquitted defendant was before the Supreme Court in Commonwealth v. Tilghman, 4 S. & R. 127 (1818), where Mr. Justice Gibson prophesied that the provision in the Act of 1804 would 'prove highly beneficial' even though it, 'at first view, may appear unjust.' One hundred thirteen years later Judge Keller, speaking for this Court, said of the provision imposing costs upon acquitted defendants, 'However anomalous the course may appear to jurisdictions unfamiliar with our procedure, it is the law of this Commonwealth and it works substantial justice.' Commonwealth v. Cohen, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931). Between these two decisions the statutory provision here questioned was examined by the appellate courts, and its use aproved many times: Harger v. Commissioners of Washington Co., 12 Pa. 251 (1849); Baldwin v. Commonwealth, 26 Pa. 171 (1856); Commonwealth v. Kennan, 67 Pa. 203, 207, 208 (1871); Linn v. Commonwealth, 96 Pa. 285 (1881). In Commonwealth v. Tremeloni, 93 Pa. Superior Ct. 432 (1927) this Court reversed the court below which had set aside the costs imposed upon a defendant by a jury." (Footnote omitted.)

Also see *Wright v. Commonwealth*, 77 Pa. 470 (1875).

prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return or verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

Appellant was charged with pointing a deadly weapon at another person in violation of § 716 of The Penal Code, June 24, 1939, P. L. 872, 18 P. S. § 4716. The evidence was that, apparently under the apprehension that persons on a neighbor's land were about to trespass upon his own property, he fired a starting pistol in their direction. The would-be trespassers, at that time, had no way of knowing that appellant was firing blanks or that the weapon was other than a live revolver. The jury acquitted appellant of the substantive offense [3] but imposed the costs of prosecution upon him.

Appellant moved to be relieved of payment of the costs, which motion was granted by the trial judge. In doing so, the court declared the Act of 1860 unconstitutional and set aside the verdict insofar as it imposed upon appellant the "penalty" of the payment of costs.

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3. However, appellant's conduct apparently did constitute an assault.

The Commonwealth appealed to the Superior Court, which reversed and reinstated the "sentence." This Court granted allocatur.

Appellant makes the general constitutional challenge that the Act violates basic principles of fairness, both procedurally and substantively. The statute is attacked as vague and lacking in sufficient standards. It is urged further that the Act is an improper delegation of legislative power in contravention of Article II, § 1, of the Constitution of Pennsylvania. It is also contended that the Act violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because it does not treat those acquitted of felonies or of summary offenses in like manner.

At the outset, it is important to note, as did the Superior Court, that the Act of 1860 is not a penal statute, some language in the very early cases notwithstanding. Imposition of costs is not part of any penalty imposed even in those cases where there is a conviction. ". . . [A] direction to pay costs in a criminal proceeding is not part of the sentence, but is an incident of the judgment: Commonwealth v. Dunleavy, 16 Pa. Superior Ct. 380. And see Commonwealth v. Moore, 172 Pa. Superior Ct. 27, 92 A. 2d 238. Costs do not form a part of the penalty imposed by statutes providing for the punishment of criminal offenses, Commonwealth v. Cauffiel, 97 Pa. Superior Ct. 202, and liability for the costs remains even after a pardon by the executive: Cope v. The Commonwealth, 28 Pa. 297; County of Schuylkill v. Reifsnyder, 46 Pa. 446." *Commonwealth v. Soudani*, 193 Pa. Superior Ct. 353, 355-56, 165 A. 2d 709, 711 (1960).

While it is true that the statute empowers the court to "pass sentence to that effect," this authority must be read with the language which immediately precedes it. So considered, it is clear that the term "sentence" is not used in its strictly technical sense as the formal pronouncement to

the accused of the legal consequences of his guilt.[4] It merely means an adjudication by the court in compliance with the statute after the jury's finding that the prosecutor or the defendant shall pay costs. That this is the legislative meaning of the phrase "pass sentence" is made unmistakably evident by the discretion granted to the jury to impose costs not only upon the acquitted defendant but also upon the prosecutor who is not even charged with a criminal offense. Moreover, should the grand jury return a bill "ignoramus," it shall also determine whether the county or prosecutor shall pay the costs.

We conclude, therefore, that the phrase "pass sentence," as used in the statute, is synonymous with the authority of the court to assess a judgment for costs in civil cases.[5]

Just as costs in civil cases may be imposed whenever permitted by statute, not as a penalty but rather as compensation to a litigant for expenses,[6] so, too, the costs

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4. "Sentence" may be defined: "The judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted. Judgment formally declaring to accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is property confined to this meaning." Black, Law Dictionary 1528 (4th ed. 1951).

5. We do not have before us the question of the validity of that portion of the Act which calls for enforcement of the collection of the costs by imprisonment. It is sufficient to note that where a defendant *refuses* to pay the costs or to provide security therefor, his confinement is the result of the court's exercise of its power to punish contempt. As the Superior Court observed: "But if he is unable to pay the costs, he may be exonerated from paying them by proceeding under the insolvency act. This procedure is available to him not only after he has been committed to prison for failure to pay the costs, but also before he is committed. Thus, an acquitted defendant upon whom the costs have been imposed may be discharged from paying them without having to undergo any actual imprisonment. Kishbaugh's Petition, 135 Pa. 468, 19 A. 1063 (1890); In re: Collection of Fines, Cost, etc., 76 Pa. D. & C. 456, 469, 471 (1950)."

6. See *Steele v. Lineberger*, 72 Pa. 239 (1872); 1 Laub, Pennsylvania Keystone, Costs § 1 (1964).

under this statute represent compensation or partial reimbursement to the county for expenses incurred in a prosecution.

The civil character of costs is further supported by the authority given the jury to fasten costs upon a prosecutor whose unjustified conduct brings about a prosecution. In this event, the jury may assess all, part or none of the costs against him. If, however, the jury determines that neither the prosecutor nor the defendant were at fault, the jury may place all of the costs upon the county. If the jury determines that both were at fault, it may divide the costs between the prosecutor and the defendant equally or in any other proportion.

Nothing more is here involved than utilization of the machinery of the courts of quarter sessions for the disposition of costs.

"The imposition of costs upon a successful litigant is not unknown to the courts of Pennsylvania. In equity, the Orphans' Court, and upon appeal to the appellate courts, costs may be placed where justice requires them to be, even though they be placed upon the successful party. The practice and procedure of placing costs upon an acquitted defendant who is not completely innocent or without fault has been a salutary and effective way of administering the criminal law." *Commonwealth v. King,* 33 Pa. D. & C. 2d 235, (1963).

Turning then, directly to the first issue presented, appellant asserts that the Act is vague and lacking in appropriate standards. For support, appellant relies on decisions wherein penal statutes have been declared invalid. We do not here have such a statute. As already noted, the imposition of costs is, in reality, civil in nature. Nor do we have a statute which attempts to create an offense without properly defining the prohibited (or required) conduct. Neither is the statute otherwise vague and uncertain or defective in failing to apprise an accused of the acts the

results of which may justify imposition of costs. See *Chester v. Elam,* 408 Pa. 350, 184 A. 2d 257 (1962).

The provisions of the statute constitute clear notice and inform both prosecutor and defendant that the matter of costs may be determined incidentally to the basic issue of guilt or innocence. The Superior Court quite properly observed: "Of course, costs of a trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence before the jury."

Assuming that there must exist a standard by which a defendant will know that he may incur costs, we are satisfied that the Act of 1860 fulfills this requirement. It is clear that the Act cannot be read by itself, but must be considered together with the particular statute creating the substantive offense and all the circumstances presented to the jury. A defendant on trial for a misdemeanor knows the charge he must meet and knows that, in the event of a conviction, he may have to pay costs as well. By the Act of 1860, a defendant is also placed on notice that if acquitted, he may have to pay all or part of the costs of the prosecution.

By judicial interpretation, the courts of this Commonwealth for over a century and a half have applied a standard of reasonableness on the issue of costs. The standard is essentially no different from that applied by a court of equity and adequately meets the objections raised by appellant. If a defendant is charged with a misdemeanor and is brought to trial, and a prima facie case is made out, but the jury finds only reprehensible acts or misconduct which fall short of the offense charged, he may be held responsible for the costs of prosecution if his misconduct gave rise to it.[7]

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7. As a practical matter, if the Commonwealth fails to establish a prima facie case, the defendant may be discharged on demurrer and no costs may be imposed upon him.

A defendant charged with a misdemeanor also knows that even if the Commonwealth proves its case against him, a jury may still act in his favor by returning a verdict of "not guilty and pay the costs" plus the silent admonition "but don't do it again." Indeed, it is often his fervent hope that the jury will so find.

Judge J. Frank Graff, a highly experienced and very able trial judge, in passing upon this issue in *Commonwealth v. King, supra,* 33 D. & C. 2d at (1963), appropriately held: "The standard by which costs may be placed upon the defendant must arise out of the particular case upon trial. As a factual matter, from vast experience in the trial of cases, juries are reluctant upon occasions to adjudge a defendant guilty, and seek the alternative of not making a record against him, but requiring him to pay the costs, because of his reprehensible conduct. The Constitution does not require impossible standards; all that it requires is that the language conveys sufficiently definite warning as to the prescribed conduct, when measured by common understanding and practice: Roth v. United States, supra [354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)] . . . ."

We are satisfied, therefore, that the Act of 1860, as construed and applied, comports with due process of law and is constitutionally acceptable and fundamentally fair.

Appellant contends that the statute denies procedural due process because the only *hearing* contemplated is the trial of the substantive offense and there is not opportunity to "defend" on the issue of costs. By this argument, appellant concedes that there is a hearing afforded, but apparently believes that the Act should provide for a separate hearing on the matter of costs. The trial on the substantive offense offers ample opportunity to defend on the basis that defendant's conduct warrants neither a verdict of guilty nor imposition of costs. In the language of the Superior Court: "He has an opportunity to be heard on the question of costs. The decision of the jury is based

upon evidence heard by it. The defendant has a right to question the charge of the court on the question of costs. He has the right to subsequently challenge the amount of the costs taxed, and to challenge any arbitrary verdict by the jury in imposing the costs upon him."

We also find no merit in appellant's argument that the Act of 1860 is an unconstitutional delegation of legislative power to the judiciary. We are in full accord with the Superior Court's treatment of that issue: "It is obvious that in authorizing the disposition of costs, the legislature has not delegated the power to the jury to make a law, but only the power to determine some fact or state of things upon which the law makes its action depend. This it may do. Locke's Appeal, 72 Pa. 491, 498 (1873); Nester Appeal, supra, 187 Pa. Superior Ct. 313, 316, 144 A. 2d 623 (1958). It is not an exercise of a legislative power by the judiciary for it, through a jury, to dispose of the costs in accordance with a statutory provision, but it would be an unconstitutional assumption of a legislative power by the judiciary were the courts to ignore the statute and dispose of costs contrary to its provisions."

Finally, appellant urges that there is no rational basis for the imposition of costs on a defendant acquitted of a misdemeanor when one acquitted of an unfounded summary offense [8] or a felony [9] is immune from this burden. Consequently, appellant contends the Act of 1860 denies him equal protection of the law.

The Superior Court appropriately answered: "The separation of crimes into these classes and the application of different rules to the different classes has been so uniformly recognized and so firmly established in our law that the validity of legislation dealing with these classes separately need no longer be examined. Although the classification of particular crimes by the legislature may not always

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8. Act of Sept. 23, 1791, 3 Sm. L. 37, § 13, 19 P. S. § 1221.

9. Act of March 31, 1860, P. L. 427, § 64, 19 P. S. § 1223.

appear consistent, the separation of crimes into these classes and the application of different rules to each class is a matter for the legislature and its exercise of that power in separating crimes for the payment of costs is not a violation of the constitution. A classification may be discriminatory and not unconstitutional if any state of facts can [reasonably] be conceived that would sustain it. Jones & Laughlin Tax Assessment Case, 405 Pa. 421, 436, 175 A. 2d 856 (1961)."

In the instant situation, it appears that felony prosecutions are of such public importance that the Commonwealth is willing to bear the costs thereof. As to summary offenses, there is no jury which may impose costs.

Classification is a task exclusively for the Legislature. Our only inquiry is to determine whether a classification is patently arbitrary and utterly lacking in rational justification. *Milk Control Commission v. Battista,* 413 Pa. 652, 198 A. 2d 840 (1964). The classification created by the Act of 1860 does not violate this standard, and it must be permitted to stand.

Appellant has failed to meet his heavy burden of proving that the Act of 1860 clearly, palpably and plainly violates the Constitution. *Milk Control Commission v. Battista,* supra.

We share the Superior Court's concluding comment: "The statutory provision here attacked has thrice been enacted by the legislature; it has twice been held constitutional by the Supreme Court; it has been examined, tested, construed and applied for a century and a half; it is believed by many able trial and appellate court judges to do substantial justice; it constitutes a practical and realistic answer to the problem of costs. We can find no reason that would justify our holding it unconstitutional."

The order of the Superior Court is affirmed.

APPENDIX "B".

DISSENTING OPINION IN THE SUPREME COURT OF PENNSYLVANIA.

MR. JUSTICE COHEN:

I would adopt the dissenting opinion of Judge FLOOD, 202 Pa. Superior Ct. 310, 196 A. 2d 189 (1963), and reverse the judgment of the Superior Court.

APPENDIX "C".

MAJORITY OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

OPINION BY WOODSIDE, *J.*, December 12, 1963

This is an appeal by the Commonwealth from an order of the Court of Quarter Sessions of Chester County vacating a sentence to pay the costs of a criminal prosecution. The sentence had been imposed upon a defendant after a jury had found him not guilty of the misdemeanor with which he was charged, but had directed him to pay the costs of prosecution.

The defendant was charged with wantonly pointing and discharging a firearm in violation of The Penal Code of June 24, 1939, P. L. 872, § 716, 18 P. S. § 4716.

The legislature has provided for the disposition of costs in misdemeanor cases by providing, inter alia, that ". . . in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; . . ." Act of March 31, 1860, P. L. 427, 445, § 62, 19 P. S. § 1222. This was a reenactment of a substantially similar provision contained in the Act of December 7, 1804, 4 Smith's Laws 204, which was a temporary act, "continued and made perpetual" by an act passed March 29, 1809, 5 Smith's Laws 48. Thus, the statutory law of this Commonwealth has permitted the imposition of costs upon acquitted defendants for over a century and a half.

The court below found that the above provision of the Act of 1860 permitting the imposition of costs upon an acquitted defendant was unconstitutional for a variety of

reasons. The court in its opinion suggested that the statutory provision is unconstitutionally vague; that it is an unconstitutional delegation of legislative power; that it violates the doctrine of fundamental fairness; that it affords no hearing that it is a denial of the equal protection of the law; that it does not require proof beyond a reasonable doubt; that it provides for an unreasonable classification; and that it is an instrument of oppressive cruelty. To our knowledge, no court has ever found a Pennsylvania statute in such flagrant violation of the Constitution! If the statute were so flagrantly unconstitutional, it would indeed be a sad commentary upon the scores of appellate court judges who have examined the provision and the hundreds of trial judges who have applied it without seeing in it any of the infirmities conceived by the court below.

The validity of a statute imposing costs upon an acquitted defendant was before the Supreme Court in Commonwealth v. Tilghman, 4 S. & R. 127 (1818), where Mr. Justice Gibson prophesied that the provision in the Act of 1804 would "prove highly beneficial" even though it, "at first view, may appear unjust." One hundred thirteen years later Judge Keller, speaking for this Court, said of the provision imposing costs upon acquitted defendants, "However anomalous the course may appear to jurisdictions unfamiliar with our procedure, it is the law of this Commonwealth and it works substantial justice." Commonwealth v. Cohen, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931).[1] Between these two decisions the statutory provision here questioned was examined by the appellate courts, and its use approved many times: Harger v. Commissioners of Washington Co., 12 Pa. 251 (1849); Baldwin v. Commonwealth, 26 Pa. 171 (1856); Commonwealth v. Keenan, 67 Pa. 203, 207, 208 (1871); Linn v. Commonwealth, 96 Pa. 285 (1881). In Commonwealth v. Tremeloni, 93 Pa.

1. Few students of Pennsylvania courts would fail to include Chief Justice Gibson and President Judge Keller among the greatest half dozen appellate court judges of this Commonwealth.

Superior Ct. 432 (1927) this Court reversed the court below which had set aside the costs imposed upon a defendant by a jury.

In addition to the above cases which affirmed the imposition of costs upon acquitted defendants, other appellate court cases have recognized the legality of the provision. For examples see, County of Wayne v. Commonwealth, 26 Pa. 154 (1856)); Commonwealth v. Kocher, 23 Pa. Superior Ct. 65 (1903); Berks County v. Pile, 18 Pa. 493 (1852). The provision here questioned was examined and applied in scores of lower court cases, including Commonwealth v. King, — D. & C. 2d —, decided this year.[2]

Our Supreme Court has passed upon the constitutionality of the provision of the Act of 1860 imposing costs upon an acquitted defendant. In Wright v. Commonwealth, 77 Pa. 470 (1875) [3] the appellant, who had been acquitted of a misdemeanor but sentenced to pay the costs, contended that § 62 of the Act of March 31, 1860, P. L. 427, 445, supra, was unconstitutional. The Supreme Court rejected the contention and affirmed the sentence imposing the costs upon the defendant. In the argument before us it was suggested that cases decided prior to the 14th Amendment to the Federal Constitution and prior to the adoption of our Constitution of 1874 are of little authority in presently considering the constitutionality of the statutory provision here being attacked. The argument is not pertinent for our Supreme Court has upheld the constitutionality of the questioned statutory provision *after* the adoption of Pennsylvania's present constitution and *after* the adoption of the 14th Amendment to the Federal Constitution.

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2. The opinion in this case was written by President Judge J. Frank Graff, one of the most revered trial judges of this Commonwealth with over 39 years judicial experience, specially presiding in Allegheny County and sitting with two other able and experienced trial judges, Judges Samuel Weiss and Lloyd Weaver. The defendant's brief on the question of costs filed in that case appears to be identical with the defendant's brief filed with us.

3. No reference to this case is made in the opinion of the court below or in the briefs of the parties.

The Supreme Court has sustained the validity of the Act of 1804 and the Act of 1860. When the validity of a statute is attacked and a decision rendered sustaining it, there is a presumption that all existing reasons for declaring the act unconstitutional were considered and deemed insufficient. Keator v. Lackawanna County, 292 Pa. 269, 272, 141 A. 37 (1928); Dole v. Philadelphia, 337 Pa. 375, 379, 11 A. 2d 163 (1940); Nester Appeal, 187 Pa. Superior Ct. 313, 319, 144 A. 2d 623 (1958).

As the Supreme Court has twice passed upon the constitutionality of the very provision here questioned, the court below and this Court have no standing to overrule that Court's holding. Ordinarily, we would rest our decision on Wright v. Commonwealth, supra, without further comment. However, the appellee has suggested that "no one has heretofore challenged the constitutionality under present day constitutional concepts of Pa. Stat. Ann. tit. 19 § 1222." Of course, the constitutionality of the provision *has* been challenged and its validity upheld by the Supreme Court of Pennsylvania, so we must assume that counsel is asking us to apply to the statute a new test based upon "present day constitutional concepts," which, he says, "accord a fuller measure of protection to accused persons." It is not clear to what extent this Court is being asked to ignore existing decisions of our Commonwealth's highest court, but it is clear that counsel is suggesting that the legislature has less power to deal with matters of this nature today than it did when "old" concepts of the constitution existed. But, consider what one of the most distinguished proponents of the "present-day concept" said *this year* on the question of declaring unconstitutional a state act which made it a misdemeanor to carry on a business theretofore considered to be legal. Mr. Justice Black, in speaking for at least eight members of the Supreme Court of the United States, said that that Court has "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the

judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U. S. 726, 730, 83 S. Ct. 1028 (1963). An examination of 7 P. L. E. Constitutional Law § 17 and cases there cited will demonstrate how far our own courts have gone in applying this rule.

The defendant in this case has a heavy burden to set aside the verdict of his peers based upon a statute of the legislature. As stated by Mr. Justice Cohen in the case of Realty Corp. v. Philadelphia, 390 Pa. 197, 205, 134 A. 2d 878 (1957), "No act or portion thereof should be declared unconstitutional unless 'it violates the Constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation in our minds.' Kelley v. Baldwin, 319 Pa. 53, 54, 179 A. 736 (1935); Sablosky v. Messner, 372 Pa. 47, 59, 92 A. 2d 411 (1952)." "The burden of proof is upon the one who claims that the statute is unconstitutional." Commonwealth v. Bristow, 185 Pa. Superior Ct. 448, 458, 138 A. 2d 156 (1958).

We know of no Pennsylvania statute whose validity has been attacked after so many years of constant application. Since the Act of 1804, two new constitutions have been adopted and scores of amendments have been made to the present constitution.[4] There have been over a hundred regular sessions of the legislature and a score of special sessions since the Act of 1804 was enacted. Hundreds of judges have examined and passed upon the statutory provision here questioned. As stated by Mr. Justice Agnew, and repeated by the Supreme Court in Booth & Flinn, Ltd. v. Miller, 237 Pa. 297, 306, 85 A. 457 (1912) concerning a somewhat similar situation, "The continued exercise of the power . . . cannot be accounted for except on the ground

4. The appellee argues that we should declare the questioned provision unconstitutional because the constitutions of a few other states prohibit the practice. If the statute were unconstitutional in the manner appellee suggests these states would not need a specific constitutional prohibition. The fact that our constitution, twice rewritten and frequently amended, does not prohibit the imposition of costs is a strong argument and the people of this Commonwealth have joined with their legislature and their courts in approving the practice.

that all men, learned and unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it."

A construction of the constitution adopted and acted upon by the legislature and acquiesced in by the people for many years is entitled to great weight. Summit Hill Borough, 240 Pa. 396, 399, 87 A. 857 (1913); 7 P. L. E. Constitutional Law § 12. It is true that mere passage of time does not give validity to an unchallenged statute, but the fact that a statute has been in effect for many years, even when unchallenged, is a strong argument in favor of validity. James v. Public Service Commission, 116 Pa. Superior Ct. 577, 177 A. 343 (1935) 7 P. L. E. Constitutional Law § 20. The provision questioned here has not only been in existence since the earliest days of our Commonwealth but it has been twice challenged and its validity sustained.

The questioned provision of the Act of 1860 has been equated in the opinion of the court below and throughout the brief of the appellee with the practice which this Court condemned in Commonwealth v. Franklin, 172 Pa. Superior Ct. 152, 92 A. 2d 272 (1952). Prior to the decision in the Franklin case, which held the practice unconstitutional, certain judges, almost exclusively in Philadelphia, frequently held a defendant in bail to keep the peace after he had been acquitted by a jury. Few of the defendants thus held could raise the bail, and as a result they spent months and often years in jail. From 1939 to 1949, 478 acquitted defendants in Philadelphia served a total of over 600 years in prison, an average of well over a year each. The practice was unknown to most of the areas of the Commonwealth, and generally shocked "up state" judges who encountered it in Philadelphia.

There is no comparison between the statutory provision here questioned and the practice condemned in the Franklin case. Here the General Assembly of Pennsyl-

vania thrice authorized the imposition of costs by a jury upon defendants found not guilty; the practice condemned in the Franklin case was not based upon an act of our legislature, but was a procedure adopted by the courts from an English Statute, 34 Edw. III c 1, enacted in 1360. Here a jury composed of the defendant's peers directed the imposition of the costs; the practice condemned in the Franklin case flouted the findings made by a jury of the defendant's peers. Here the purpose and usual effect of the procedure is limited to the recovery of expenses for which the defendant's conduct was at least partially responsible; the practice in the Franklin case and its practical effect was to commit acquitted defendants to jail for long periods of time. Here the appellate courts of this Commonwealth considered and approved the practice in numerous cases; the Franklin case was the first, at least since the 14th Amendment to the Federal Constitution, to examine the constitutionality of a practice which had never been specifically sanctioned by our legislature.

Counsel for the appellee with light regard for the legislature and the courts suggests that the words "or the defendant" were inserted in the Act of 1804 "either by mistake or without clear recognition of their ramifications";[5] that in 1860 the legislature inserted the provision "without consideration of its merits";[6] that Mr. Justice Gibson was not familiar with the common law of Pennsylvania on imposition of costs when he wrote about it in 1818, that he misled subsequent judges and textbook writers, and that the imposition of costs upon acquitted

5. He ignores that the identical provision was examined by the legislature of 1809 which decided that it should be continued and made perpetual.

6. In 1949 a legislative Committee on Penal Laws and Criminal Procedure of the Joint State Government Commission, after careful consideration of the then existing laws governing procedures in criminal matters, retained the provision here under review in its proposed recodification. See Senate Bill 988, 1949 Session, § 1601. Serving on that committee as legislators were five present members of the judiciary: Judges Lord, Brown, Rahauser, Readinger, and Woodring.

defendants was unknown except in Pennsylvania.[7] As we view this case, the common law relating to costs prior to 1804 is no longer important. If other states have different ideas on the disposition of costs in misdemeanor cases, that is an argument to be addressed to the legislature and not the courts. The argument that the legislatures of 1804, 1809 and 1860 did not know what they were doing deserves no reply.

We cannot follow the defendant's argument that the questioned statutory provision constitutes an unlawful delegation of legislative power. It is obvious that in authorizing the disposition of costs, the legislature has not delegated the power to the jury to make a law, but only the power to determine some fact or state of things upon which the law makes its action depend. This it may do. Locke's Appeal, 72 Pa. 491, 498 (1873); Nester Appeal, supra, 187 Pa. Superior Ct. 313 316, 144 A. 2d 623 (1958). It is not an exercise of a legislative power by the judiciary for it, through a jury, to dispose of the costs in accordance with a statutory provision, but it would be an unconstitutional assumption of a legislative power by the judiciary were the courts to ignore the statute and dispose of costs contrary to its provisions.

The defendant contends that it is an unconstitutional classification to separate the crimes into summary convictions, misdemeanors and felonies for the purpose of determining in which cases the costs may be placed upon defendants and in which cases they may not be placed upon them. The separation of crimes into these classes and the

7. On the early law of this Commonwealth on this point see Commonwealth v. Tilghman, supra, 4 S. & R. 127 (1818); Berks County v. Pile, supra, 18 Pa. 493, 496 (1852); Long v. Lancaster County, 16 Pa. Superior Ct. 413, 417 (1901); Commonwealth v. Kocher, supra, 23 Pa. Superior Ct. 65, 67, 68 (1903); Kessler on Criminal Procedure in Pennsylvania, Vol. 1, page 235, and cases there cited. On whether this provision has been unique to Pennsylvania see: State v. Butcher, 1 Del. Cases 334 (1793); State v. Miller, 1 Del. Cases 512 (1814); Delaware Constitution of 1792, Art. VIII, § 8; Keith v. State, 27 Ga. 483 (1859); State v. Hargate, 1 N. C. 196 (1800).

application of different rules to the different classes has been so uniformly recognized and so firmly established in our law that the validity of legislation dealing with these classes separately need no longer be examined. Although the classification of particular crimes by the legislature may not always appear consistent, the separation of crimes into these classes and the application of different rules to each class is a matter for the legislature and its exercise of that power is separating crimes for the payment of costs is not a violation of the constitution. A classification may be discriminatory and not unconstitutional if any state of facts can be conceived that would sustain it. Jones & Laughlin Tax Assessment Case, 405 Pa. 421, 436, 175 A. 2d 856 (1961).

Contrary to the defendant's contention, the statutory provision here questioned meets the requirements of the due process clause of Art. 1, § 9 of the Constitution of this Commonwealth and the 14th Amendment to the Constitution of the United States. The defendant in a criminal case is presumed, as all of us are, to know the law. Thus, when brought to trial on an indictment charging a misdemeanor, the defendant has notice that the jury may impose the costs of prosecution upon him even if he is acquitted. He has an opportunity to be heard on the question of costs. The decision of the jury is based upon evidence heard by it. The defendant has a right to question the charge of the court on the question of costs. He has the right to subsequently challenge the amount of the costs taxed, and to challenge any arbitrary verdict by the jury in imposing the costs upon him.

The defendant assumes that the imposition of costs under the Act of 1860, supra, is the infliction of punishment upon a person for undefined conduct. The imposition of costs on either the prosecutor or defendant is not punishment for the commission of a crime. Imposition of costs does not form a part of the penalty of even guilty defendants. Commonwealth v. Soudani, 193 Pa. Superior

Ct. 353, 356, 165 A. 2d 709 (1960); Commonwealth v. Cauffiel, 97 Pa. Superior Ct. 202, 205 (1929); Commonwealth v. Moore, 172 Pa. Superior Ct. 27, 29, 92 A. 2d 238 (1952). It is true that a person sentenced to pay the costs in a criminal case may be committed to prison for refusing to pay them. But if he is unable to pay the costs, he may be exonerated from paying them by proceeding under the insolvency act. This procedure is available to him not only after he has been committed to prison for failure to pay the costs, but also before he is committed. Thus, an acquitted defendant upon whom costs have been imposed may be discharged from paying them without having to undergo any actual imprisonment. Kishbaugh's Petition, 135 Pa. 468, 19 A. 1063 (1890); In re: Collection of Fines, Cost, etc. 76 Pa. D. & C. 456, 469, 471 (1950).

The costs of a case do not always fall upon the unsuccessful party. There are situations in divorce cases, support cases, equity cases and orphans' court cases where costs, in whole or in part, may be imposed upon the party successful in the action.

There are many crimes made punishable by the legislature which have never been defined by it. The legislature looks to the common law, i.e., court decisions, to define many serious offenses for which it provides punishment. The Act of 1860, supra, is as specific as any statute can be concerning the right of the jury to dispose of costs in a misdemeanor case, the manner in which the jury may divide the costs and the parties upon whom it may impose the costs. Of course, costs of a trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence before the jury. The imposition of costs other than upon the county must be based upon conduct by either the prosecutor or the defendant or both which is related to the case. It is not necessary, indeed it would be impossible, for the legislature to detail all the circumstances and conditions under which the jury should or should not impose the

costs upon the parties. The legislature need not set forth with the same particularity the circumstances under which a jury, under the control of the court, may exercise the power given to it, as it must set forth the area within which a governmental board or commission must act. Nester Appeal, supra, 187 Pa. Superior Ct. 313, 320, 144 A. 2d 623 (1958).

The statute itself does not produce unconstitutional unfairness. Should the verdict in a particular case be arbitrary or should there be a gross abuse of discretion in the imposition of the costs upon either the prosecutor or the defendant, the court has the power to relieve the party from such arbitrary or unjust verdict. Commonwealth v. Cohen, supra, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931); Dunn Appeal, 191 Pa. Superior Ct. 346, 349, 156 A. 2d 349 (1959). The public is frequently put to the cost of trying a defendant because of reprehensible conduct by him. When the jury is warranted by the evidence and authorized by the legislature to collect these costs from such defendants there is no reason why the will of the legislature and the jury should be set aside when it is not arbitarary or unwarranted under the evidence.

Those who think it is inconsistent and basically unfair to place the costs upon acquitted defendants insist upon cataloguing all conduct as either wholly right or wholly wrong. But most human conduct does not fit into these absolutes. Any effort to show life in black and white, without gray, fails to accurately portray the truth. Judges, jurors, and legislators for over a century and a half have recognized the "substantial justice" of this provision for the simple reason that in practice it produces results that are fair and just.

There are endless situations in which the jury might find that the defendant's improper conduct was responsible for the prosecution even though he was not guilty of the crime charged. It is not unjust for a jury to impose costs upon a defendant where the defendant may have clearly

committed the offense charged but was able to raise a reasonable doubt that the offense was brought within the statute of limitations; or where the prosecutor and the defendant involved in a fist fight were guilty of conduct not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs; or where the defendant in a drunken driving" case drank and then drove while in that twilight zone that exists at some stage of the drinking; or where defendants charged with adultery registered at a hotel as husband and wife but convinced the jury that they had not actually committed adultery. As stated in Commonwealth v. Franklin, supra, 172 Pa. Superior Ct. 152, 193, 92 A. 2d 272 (1952), "A most important portion of the administration of our system of criminal justice is the fact that the jury in subtle ways may temper the rigidity of our criminal code in the application of the letter of the law to particular cases and may perhaps thereby mitigate the rigors of the law."

If the test of constitutionality is to be based solely upon a concern for the accused, that concern may not be well placed, for there are undoubtedly many cases where a verdict of "not guilty but pay the costs." would have been a verdict of guilty had there been no compromise position for the jury to take. See discussion by Judge Burton R. Laub of Erie County in his Pennsylvania Trial Guide § 171.

The defendant in this case was charged with violation of The Penal Code of June 24, 1939, P. L. 872, § 716, 18 P. S. § 4716, supra, which provides that "Whoever playfully or wantonly points or discharges a gun, pistol or other firearm at any other person, is guilty of a misdemeanor . . ." From the part of the record before us, it appears that a woman, her child and her dog were visiting next door to the defendant. The dog started toward the defendant's property, the child followed it, and the mother pursued both of them to keep them from the defendant's property. The defendant presumably seeing the child coming toward his property rushed from his home with a pistol and fired it in

the direction of the people, all of whom remained on the neighbor's property. Whether or not this conduct constitutes a violation of § 716 is not before us. The jury acquitted the defendant apparently believing that the defendant had fired a blank from a starting revolver which was not aimed directly at the people in the neighbor's yard. The people in whose direction the defendant fired had no way of telling whether he was shooting blanks or just failing in an attempt to hit them. The conduct of the defendant was improper and such as to warrant bringing the prosecution. He was fortunate to have been acquitted, but substantial justice was done to all concerned by the imposition of the costs upon him.

The statutory provision here attacked has thrice been enacted by the legislature; it has twice been held constitutional by the Supreme Court; it has been examined, tested, construed and applied for a century and a half; it is believed by many able trial and appellate court judges to do substantial justice; it constitutes a practical and realistic answer to the problem of costs. We can find no reason that would justify our holding it unconstitutional.

Order reversed, sentence reinstated.

Flood, J. files a dissenting opinion.

APPENDIX "D".

DISSENTING OPINION IN THE SUPERIOR COURT OF PENNSYLVANIA.

FLOOD, *J.*

Section 62 of the Act of March 31, 1860, P. L. 427, 19 PS § 1222, insofar as it authorizes the jury to impose costs upon an acquitted defendant and subjects him to commitment to jail upon failure to pay them, is a penal statute. Yet it does not say what conduct shall subject the acquitted defendant to this penalty. Consequently, when the jury determines that an acquitted defendant shall pay the costs and the court proceeds, in accordance with the statute "forthwith" to "pass sentence to that effect and order him to be committed to the jail of the county until the costs are paid, unless he give security . . ." there is a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States and Art. I, § 9, of the Constitution of Pennsylvania. *Chester v. Elam,* 408 Pa. 350, 184 A. 2d 257 (1962).

The statute before us is a penal statute. It was so denominated by Mr. Justice GIBSON in *Commonwealth v. Tilghman,* 4 S. & R. 127 (1818) in considering the Act of 1804, of which § 62 of the Act of 1860 is a faithful and literal reproduction. "I grant, that a statute imposing costs, is penal in its nature and must be construed strictly . . . ." This is the language of GIBSON, J., in the opinion in the *Tilghman* case which is relied upon, mediately or immediately, by all the subsequent cases holding these two acts valid. In a later case, the Supreme Court said: "The statute which enables a grand or petit jury to punish with costs is penal, and to be strictly construed." *Clemens v. The Commonwealth,* 7 Watts 485 (1838).

It is a penal statute because under it costs can be imposed only upon a defendant who has been indicted.

It is penal in that it may result in a jail commitment, such commitment being mandatory under the statute if the

acquitted defendant does not pay the costs at once or give security to pay them within ten days. In this it is unlike statutes imposing costs in civil cases, such costs, in the absence of fraud being enforceable only by execution against property. *S. S. Pierce's Appeal,* 103 Pa. 27 (1883).

The legislature which adopted it evidently considered it penal because it was enacted as part of an act entitled "An Act to Consolidate, Revise and Amend the Laws of this Commonwealth relating to Penal Proceedings and Pleadings."

Nor is the conclusion that this statute is penal in any way weakened by the fact that the imposition of costs, following a judgment of conviction, not acquittal, has been held for some purposes to be an incident of the judgment, rather than punishment for the crime. This apparently stems from *Commonwealth v. Dunleavy,* 16 Pa. Superior Ct. 380 (1901), which held that a suspended sentence on condition that costs be paid was not a sentence so as to destroy the court's power later to revoke the suspension and impose a prison sentence. Cases like *Commonwealth v. Soudani,* 193 Pa. Superior Ct. 356, 165 A. 2d 90 (1960), holding the costs following a conviction are not part of the sentence, but are an incident of the judgment, cannot apply to defendants found not guilty. Costs on the defendant cannot possibly be "incident" to a judgment following a not guilty verdict. The statute provides that when the jury shall upon acquittal determine that the prosecutor or the defendant shall pay the costs, "the court shall forthwith pass *sentence* to that effect." The sentence as to an acquitted defendant can only be that he pay the costs. This is the actual judgment and not an incidnet to the judgment. The cases holding that the imposition of costs is an incident to a judgment of sentence upon a guilty verdict lend no support to the proposition that the imposition of costs on an acquitted defendant is something other than punishment.

It is to be noted that even in civil cases the Supreme Court said, again speaking through Gibson, J.: "At com-

mon law, there were no costs expressly by name, but the plaintiff, where he failed, was punished in amercement *pro falso clamore,* and the defendant, where the judgment was against him in *miserecordiá cum expensis litis,* for his unjust detention of the plaintiff's right; and this was the foundation of the statutes which afterwards gave costs by name; so that costs, in their origin, were rather a punishment of the party paying, than a recompense to the party receiving them." *Musser v. Good,* 11 S. & R. 247, 250 (1824).

No amount of dialectic can alter the fact that this statute provides that an accused may go to jail without having been convicted of any crime—indeed after having been acquitted of the only crime of which he was charged. This is depriving him of his liberty without due process of law under the cases which have superseded the authority of those relied upon by the majority.

This is the clear import of the decision of the United States Supreme Court in 1939 in *Lanzetta v. New Jersey,* 306 U. S. 451, the decision of this court in 1952 in *Commonwealth v. Franklin,* 172 Pa. Superior Ct. 152, 92 A. 2d 272, and the decision of the Supreme Court of Pennsylvania in 1962 in *Chester v. Elam,* 408 Pa. 350, 184 A. 2d 257.

In *Lanzetta* the Supreme Court of the United States held that a statute violated due process which made it criminal to be a "gangster", which was defined as "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State. . . ." The court held that the interpretation of the statute by the highest court of New Jersey did not save it from being too indefinite and too vague to enforce within the requirements of due process. The court speaking through Mr. Justice BUTLER further said: "It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the lan-

guage later used by the court. . . . The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

The resemblance to the statute before us is obvious. The statute here condemns no act or omission. The majority points to the common law crimes, punishable under our statutes but defined only by the common law, i.e., decisions of the courts. The precise common law definitions of such crimes, e.g., murder, rape, burglary or arson, could not contrast more sharply than they do with the majority's attempt to define what is punishable here—conduct "related to the prosecution", "reprehensible conduct", conduct "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal division of the costs", conduct "in the twilight zone between drunken driving" and something less, or something reprehensible that does not constitute a crime, such as registering falsely at a hotel as husband and wife.

In *Commonwealth v. Franklin*, supra, we held that the Statute of Edward III, authorizing the court to hold under bond to keep the peace "all them that be not of good fame", was unconstitutionally vague.

Finally in *Chester v. Elam*, supra, our Supreme Court said that the phrase "disorderly conduct" was unconstitutionally vague under both the Federal and Pennsylvania Constitutions, quoting from *Lanzetta v. New Jersey*, supra, as follows: "A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law." What the statute before us forbids under penalty of imposition of costs upon an acquitted defendant, with imprisonment for nonpayment, is something undefined in the statute whose meaning can only be guessed at by men of common intelligence.

Only one of the appellate cases relied upon or cited by the majority (*Wright v. Commonwealth*, 77 Pa. 470 (1875)) may have considered the statute in the light of the Fourteenth Amendment, and it is not at all clear that even this case did so. The statement of the case (presumably by the reporter) is that the defendant assigned for error, among other things, that the provision we are considering in § 62 of the Act of 1860, as well as § 1 of the Act of 1864, under which the defendant was indicted, was unconstitutional. While the opinion did discuss briefly the constitutionality of § 1 of the Act of 1864, as to § 62 of the Act of 1860 the court said only: "The objection to the imposition of costs, on the ground that a verdict of not guilty was rendered, is equally futile. We must presume the jury had a good reason for doing so, arising in the conduct of the defendant. And even if the indictment had been so defective that no conviction could have rested upon it, still the right to impose costs existed. This was expressly decided, and good reasons stated for the decision, in Commonwealth v. Tilghman, 4 S. & R. 127." This opinion thus refers back to and relies upon the *Tilghman* case, supra, decided in 1818, and makes no reference to the Fourteenth Amendment to the Constitution of the United States or to the Constitution of Pennsylvania.

It must not be forgotten that a violation of due process can occur as a result of jury action as well as through the action of a judge. Such a violation occurs in cases in which a guilty verdict is based upon evidence obtained by illegal search and seizure, or in a trial for felony in which the defendant is not represented by counsel and has not intelligently waived such representation, or when there is any other unwaived violation of due process in the course of the trial.

This defendant has not been found guilty of a crime, or of refusing to pay for the machinery of justice which he has set in action improperly, or of some violation of another's rights which the other has vindicated by winning

a law suit against him. He is not being asked to pay because of some duty he has voluntarily assumed by marriage or parenthood, nor is he asked to pay indirectly the cost of having an inheritance or other property right vindicated.

The majority suggests that it is not necessary to give notice to the defendant of what he is to be tried for, since we can rely upon his presumed knowledge of the law that under the Act of 1860 costs may be imposed upon him if he is acquitted. But for what? The act does not say. Is it, as the majority and some other opinions indicate, because he has done "something reprehensible", or because he may be guilty even though found not guilty. Against what is he to defend? Is he to be compelled to put in evidence his good character and thus give the prosecution the right to bring into evidence any previous offenses?

The majority say he has the opportunity to be heard upon his liability for costs, but about what? Is the district attorney to be permitted to discuss "reprehensible conduct" other than the crime charged, and is his counsel thus going to be compelled to scatter his defense so as to meet this indefinite charge as well as the crime for which he is indicted? Is the district attorney to be permitted to tell the jury that they may impose costs even if they have a reasonable doubt of his guilt? Surely this riddles the safeguard which the presumption of innocence and the Commonwealth's burden of proof purports to throw around the defendant. How could anything be put to the jury on this subject without discussing his record or the lack of it?

As the court below stated: "Trial Judges, as in this case, have consequently instructed juries in accordance therewith substantially in the language of the Tilghman case. There the Supreme Court, speaking through Mr. Justice Gibson, had said the Act was aimed at a defendant '. . . acquitted of actual crime, but whose conduct may have been reprehensible in some respects, or whose inno-

cence may have been doubtful . . . The judgment is not on the indictment but on something collateral to it. The defendant is not punished for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though on account of something, of which he was not indicted, some impropriety of conduct, or ground of suspicion, which the verdict of the jury has fastened on him . . . I grant, that a statute imposing costs, is penal in its nature . . . There may, I apprehend, be acts, such as certain kinds of fraud, that are offensive to morality, that nevertheless are not indictable . . . Wherever misconduct may be fairly imputed, either to a prosecutor or a defendant, they respectively become obnoxious to this kind of legal animadversion, although neither guilty of, nor technically charged with a crime . . . ."

The fact that Mr. Justice GIBSON found that the provision for imposition of costs upon an acquitted defendant "at first view, may appear unjust" and Judge KELLER said that it "may appear anomalous" indicates the difficulty these eminent judges found in sustaining this provision even without reference to the Fourteenth Amendment. I cannot agree that they would have sustained it today in the light of the Fourteenth Amendment, as interpreted in *Lanzetta v. New Jersey*, supra, *Elam v. Chester*, supra, *Commonwealth v. Franklin*, supra. Under these authorities, this statute, insofar as it authorizes the imposition of costs upon acquitted defendants, clearly violates due process. The order of the court below should be affirmed.

ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA.

Filed December 12, 1963.

Order reversed, sentence reinstated.

APPENDIX "E".

OPINION OF THE TRIAL COURT.

GAWTHROP, P. J., January 12, 1963.—Defendant was charged in the above two bills of indictment with unlawfully and wantonly pointing and discharging a firearm at each of two persons. At trial, a verdict of not guilty was directed and returned on bill no. 226, and the jury placed the costs of prosecution on the county. On bill no. 225, the jury returned a verdict of not guilty but ordered defendant to pay the costs. Pursuant thereto, he was ordered to pay the costs forthwith or give security to pay the same within ten days and stand committed until he complied therewith. Having so posted security, thereafter defendant, who was not represented by counsel at or after trial, having refused the court's offer to appoint counsel to represent him, with the assistance of the district attorney's office on request of the court, filed a motion to be relieved of payment of costs on the grounds that imposition thereof upon him was contrary to law, an abuse of the jury's discretion and against the weight of the evidence.

Defendant argued his motion in propria persona and, while the court held the matter under consideration, counsel entered their appearance for defendant, filed a motion for reargument which was granted, and thereafter ably argued the matter and filed an extensive and well-considered brief. The matter is now before us for decision, and, after careful consideration, the motion must be granted.

Defendant attacks the constitutionality of the Act of March 31, 1860, P. L. 427, sec. 62, 19 PS § 1222, on the four grounds that: (1) It is void for vagueness; (2) it improperly delegates legislative power; (3) it violates basic principles of due process of law; and (4) it discriminates against defendants in misdemeanor cases.

Our research and that of counsel has discovered no Pennsylvania decision prior to the first statute on the subject, the Act of 1791, infra, holding that acquitted defendants in criminal cases bore the costs of prosecution, and it appears that the contrary was true at English common law: Stephen, History of the Criminal Law of England, vol. I, pages 498-499; Bishop, New Criminal Procedure, vol. 2, §§ 1313, 1317. In Commonwealth v. Tilghman, 4 S. & R. 126, however, our Supreme Court in 1818 sustained the validity of the Act of December 7, 1805, 4 Sm. L. 204, permitting imposition of costs on acquitted defendants in misdemeanor cases, and, in so doing, stated that in Pennsylvania "at common law" [illegible] a defendant was liable for the costs of prosecution. Apparently no appellate decision has since stated otherwise. Kessler, Criminal Procedure in Pennsylvania, page 235, repeats the same Pennsylvania common law rule, citing Commonwealth v. Johnson, 5 S. & R. 195, and Strein v. Ziegler, 1 W. & S. 259.

Our statute law on the subject has not been entirely consistent as an analysis of it demonstrates. The earliest statute was the Act of September 23, 1791, P. L. 37, 43 and 44, an act to "Supplement the Penal Laws," which declared, inter alia, at page 43, that in cases where grand juries ignored bills of indictment and, at page 44, where any person was brought before a court and charged with crime and the charge "shall appear unfounded," costs should fall on the county. There followed the Act of March 20, 1797, P. L. 281, the preamble of which recited as its purpose:

"Whereas . . . persons, against whom indictments are presented by the grand inquests . . . are afterwards acquitted by a petit jury . . . And whereas, by the existing laws, a party so acquitted is equally liable to costs of prosecution as if he were convicted, *which operates injustice, and a punishment to the innocent: For remedy whereof,* . . . " it enacted that if defendant were acquitted by a

petit jury of *any indictable offense* the costs should be paid out of the county stock. (Italic supplied.)

Both acts show a clear legislative intent to relieve *all* acquitted defendants of payment of costs, and ". . . changed the odious common law principle which left the accused to pay the costs, whether convicted or acquitted; . . .": Strein v. Ziegler, supra, at 260.

Then followed the Act of December 7, 1805, 4 Sm. L. 204, the act considered in Commonwealth v. Tilghman, supra. Its preamble recited that "the laws obliging the respective counties to pay the costs of prosecutions, in *all criminal cases,* where the accused is or are acquitted, *have a tendency to promote litigation;* inasmuch as they enable restless and turbulent people to harass the peaceable part of the community, with trifling, unfounded, or malicious prosecutions at the expense of the public . . ." (Italics supplied.)

Although its stated purpose was to discourage unfounded prosecutions, its terms went further. Section 1 provided that, except in felony cases, where a grand jury ignored a bill of indictment, it should decide and certify whether the county or the prosecutor should pay the costs, but that in all cases of acquittal by a petit jury they should determine by their verdict whether the county, the prosecutor, or the *defendant or defendants* should pay the costs. Section 2 provided that where any jury determined that a prosecutor should pay the costs, the court should pass sentence to that effect by committing him to jail until the costs were paid, unless he gave security to pay them within ten days. So, while reciting a purpose of discouraging unfounded prosecutions and relieving the public of the costs in such cases, the act revived the very Pennsylvania "common law" practice of imposing costs upon acquitted defendants which the Acts of 1791 and 1797 had abolished and the latter had declared to be an "injustice" and a "punishment of the innocent." At the same time, it would appear that in felony cases the relief granted by the Act of 1791 continued to apply, as it does today.

Whether the words "or the defendant or defendants" were included deliberately or by inadvertence in the Act of 1805, they were incorporated again in the same language in its reenactment by the Act of 1860, supra, and have ever since been applied in misdemeanor cases. Trial judges, as in this case, have consequently instructed juries in accordance therewith substantially in the language of the Tilghman case. There, the Supreme Court, at page 128, speaking through Mr. Justice Gibson, had said the act was aimed at a defendant ". . . acquitted of actual crime, but whose conduct may have been reprehensible in some respects, or whose innocence may have been doubtful . . . The judgment is not on the indictment but on something collateral to it. The defendant is not *punished* for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though, *on account of something* of which he was not indicted, some *impropriety of conduct,* or *ground of suspicion,* which the verdict of the jury has fastened on him . . . I grant that a statute imposing costs is *penal* in its nature . . . There may, I apprehend, be acts, such as certain kinds of fraud, that are offensive to morality, that nevertheless are not indictable . . . Wherever *misconduct* may be fairly imputed, either to a prosecutor or a defendant, they respectively become obnoxious to this kind of legal animadversion, *although neither guilty of, nor technically charged with a crime.*" (Italics supplied.)

We are asked to reconsider the validity of a statute passed upon with approval by our Supreme Court in 1818. That decision would be binding authority upon us except that here, for the first time, substantial constitutional questions are raised in the light of more recent decisions of the Supreme Court of the United States and of the Supreme Court of Pennsylvania which we believe require us to reexamine the matter. Cf. Commonwealth v. Franklin, 172 Pa. Superior Ct. 152.

The imposition of costs upon an acquitted defendant under the Act of 1805 was a punitive measure enforceable

by imprisonment: Commonwealth v. Tilghman, supra; Commonwealth v. Harkness, 4 Binney 194. Its subsequent reenactment in the same language by the Act of 1860 indicates its interpretation has been approved by the legislature. This compels the same construction under the later act: Stautory Construction Act of May 28, 1937, P. L. 1019, sec. 52(4), 46 PS § 552(4); Parisi v. Philadelphia Zoning Board of Adjustment, 393 Pa. 458; Bogdan v. School District of Coal Township, 369 Pa. 147.

But to be constitutional, such a statute must contain clear standards by which to measure the conduct punished by it. If it is so vague that men of common intelligence must guess at its meaning and differ as to its application, it violates the first essential of due process: Lanzetta v. New Jersey, 306 U. S. 451; Chester v. Elam, 408 Pa. 350; Commonwealth v. Franklin, supra. The vagueness may be from uncertainty in regard to persons within the scope of such an act, or in regard to the applicable tests to ascertain guilt: Winters v. New York, 333 U. S. 507. Fundamental fairness requires notice of what to avoid. If the purpose of the act is not disclosed, punishment may not be imposed for conduct which, at the time of its commission, was not forbidden by law in the understanding of persons seeking to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the concept of "due process of law." Where such notice is lacking, it is said the statute is void for indefiniteness: dissenting opinion of Mr. Justice Frankfurter in Winters v. New York, supra. The act in question is totally lacking in any tests or standards by which men of common intelligence can determine what conduct will result in the imposition of costs and allows unbounded latitude for difference of opinion as to the circumstances in which it may be applied to acquitted defendants.

Similarly, for the reasons stated in Commonwealth v. Franklin, supra, the act is also unconstitutional as an improper delegation of legislative power in contravention of

article III, section 1, of the Constitution of Pennsylvania. Any statute which vests in a person or body of persons, without any standards except his or their own judgment, the power of supplying, or giving force to, or suspending its terms is unconstitutional. Judicial power is exercised only for the purpose of giving effect to the will of the legislature, which is the will of the law and not of any individual or group of persons: Commonwealth v. Franklin, supra, at 182. The act delegates to a jury the power to inflict punishment without any fixed tests or standards to guide it in such circumstances as it may see fit to do so. In so doing, it is an unconstitutional delegation of legislative power.

Defendant asserts the act violates both procedural and substantive "due process of law" in contravention of the Fourteenth Amendment to the Constitution of the United States, as that concept has more recently developed as a doctrine of "fundamental fairness." In a procedural sense, it violates that concept because it lacks standards defining, and for determination of guilt of, conduct for which the punishment may be imposed. It gives a defendant no notice of the misconduct upon which the punishment depends or of his right to defend against it. It affords no hearing on the issue of costs but only on the charge contained in the indictment to which the evidence is limited. Finally, it does not require proof beyond reasonable doubt of the misconduct underlying imposition of the penalty: In re Oliver, 333 U. S. 257; Winters v. New York, supra. Thus, it contravenes procedural due process.

Substantively, the act seems to violate "due process" by imposing a punishment or penalty upon defendant found to be innocent under the law and is a denial of "equal protection of the laws", both contrary to the Fourteenth Amendment. The fundamental unfairness of punishing the innocent is self-evident. Apparently, the practice never existed at the English common law, and, so far as we can determine, it does not exist in any other State of the

United States. It is specifically condemned in the Constitutions of Florida, North Carolina and Mississippi, and has been criticized in principle in Pennsylvania by Fuller, P. J., in Commonwealth v. Webster, 23 Luz. 359, as an "instrument of oppressive cruelty" which should not be tolerated in a civilized age. The courts of four other States have indicated that costs should not be imposed on acquitted defendants. Cf. Arnold v. State, 76 Wyo. 445, 306 P. 2d 368; Childers v. Commonwealth, 171 Va. 456; State v. Brooks, 33 Kan. 708; Biester v. State, 65 Neb. 276, 91 N. W. 416.

Finally, the act discriminates between innocent defendants in misdemeanor cases and those in cases of felonies generally. Cf. Act of 1860, P. L. 427, sec. 64, 19 PS § 1223, which places costs on the county in cases of acquittal of felonies. It has been said ". . . the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and so fast as its means allow": Buck v. Bell, 274 U. S. 200, 208. Presumably, the improper conduct giving rise to felony prosecutions is of higher degree than in misdemeanor cases, so that no reason or justification appears to support the distinction. The result is to impose a penalty on one accused but acquitted of the lesser, while relieving one accused but acquitted of a higher, degree of crime. This is an unreasonable classification and a denial of equal protection of the laws: Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535.

We consider the imposition of costs upon acquitted defendants in misdemeanor cases is, under the modern concepts of "due process of law" and "fundamental fairness," equally as offensive to the Fourteenth Amendment to the Constitution of the United States as was the requirement of entry of security after acquittal on penalty of commitment in default thereof, which was struck down in Commonwealth v. Franklin, supra. What was there said, at page 194, ff., applies equally here, especially: "The evil [of the statute] we are considering is that it is in reality

an effective power to punish in virtually unrestrained form." Under the more recent decisions of the courts of the United States and of this Commonwealth, section 62 of the Act of 1860, P. L. 427, 19 PS § 1222, is unconstitutional and void insofar as it permits imposition by the verdict of a jury of the costs of prosecution on acquitted defendants in misdemeanor cases.

Defendant's motion to be relieved of the costs of prosecution is granted. The verdict, insofar as it imposes upon defendant the penalty of the payment of costs of prosecution, is set aside as being contrary to law. The sentence imposed upon defendant that he pay said costs forthwith or give security to pay the same within ten days and to stand committed until he had complied therewith is vacated.

APPENDIX "F".

PORTION OF CHARGE OF THE COURT DEALING WITH COSTS.

GAWTHROP, *P. J.:*

If, but only if, you find not guilty verdicts, members of the jury, do you dispose of the costs of prosecution. Now, with regard to the Bill No. 226, where I have directed that you find a verdict of not guilty, you will have to dispose of the costs of prosecution. Whatever you may determine as to the other bill of indictment, if you find the defendant not guilty on the Bill No. 225, that is, the one involving the incident with the Bauman boy, then and only then will you consider the costs of prosecution on that bill.

Costs of prosecution may be disposed of in three ways where misdemeanor charges are found unproved by a jury. The charge made in each of these bills of indictment, as to all counts, is a misdemeanor charge. In felony cases, that is, more serious offenses such as rape, robbery, burglary and so forth, the jury has nothing to do with disposing of the costs in case of an acquittal. In misdemeanor cases it is the jury's duty to dispose of costs if it finds not guilty verdicts. If you find the defendant not guilty on any bill of indictment you must dispose of the costs of prosecution in one of three ways. They may be placed either upon the defendant or upon the prosecutor, or upon the county. Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction, the costs of prosecution may be placed upon him if his misconduct has given rise to the prosecution. If you find the defendant not guilty and find that he should not pay the costs as defend-

ant, you may consider whether or not you will put the costs of prosecution on the prosecutor.

Now, in the bill of indictment involving the incident with Mrs. Arters, Evelyn A. Arters is endorsed as the prosecutrix on the bill of indictment. In the bill charging the affair involving the Bauman boy, Elizabeth J. Fuhrman is endorsed on the bill as the prosecutrix. You may find that those persons are or are not the actual prosecutors, as the evidence may indicate to you, in either or both of the bills, if you find that someone else actually is the prosecutor. In any event, if you find the defendant not guilty on either of these bills, or both, as to any not guilty verdict, you may consider placing the costs of prosecution on the prosecutor if you decide the defendant should not pay them, if you find that the prosecution, instead of being brought in good faith for the reasons set forth in the charge, was on the contrary brought out of malice or some ill-will, or other improper motive; and if you find that neither the defendant nor the prosecutor should pay the costs of prosecution, in case of a not guilty verdict, then you may place the costs in the only other place where they may go, and that is on the County of Chester.

I repeat, you do not come to the question of disposing of the costs unless and until you find a verdict of not guilty. Now, under these rather strange circumstances, you will have to dispose of the costs of prosecution on Bill No. 226 in any event because I have directed that you return a verdict of not guilty on that bill. As to Bill No. 225, involving the Bauman boy, you won't reach that question of costs unless and until you first find the defendant not guilty. If you do find him not guilty on that bill, then you will consider the costs of prosecution.

(Remaining portion of Charge of Court not transcribed.)

(The Jury retired but returned for further instructions as follows:)

THE COURT: Members of the jury, you have asked this question of the Court in writing: "If a verdict of innocence is arrived at may we then divide the costs of prosecution between the defendant and the prosecutor? If so, may we decide how the costs should be divided?"

I will answer those questions in the order in which you have asked them. If you find a verdict of not guilty on either or both bills of indictment, and you will recall that we have directed you to find a not guilty verdict on one of the bills involving Mrs. Arters' matter, if you find a verdict of not guilty on any bill of indictment the costs on that bill of indictment may be divided between the defendant and the prosecutor, naming the prosecutor—and that is important if your verdict is to be effective—in such proportion as you determine to be appropriate. Our Act of Assembly provides that that may be done.

That answers, I think, both of your questions. In other words, first, you may, in case of a not guilty verdict, divide the costs between the prosecutor and the defendant, on that or any such bill of indictment. And in so doing you must name the prosecutor to make your verdict effective in that respect. You may divide the costs between the defendant and the prosecutor in such proportion as to you seems proper under the circumstances.

Does that answer your question?

FORELADY: Yes.

THE COURT: Very well. Will you please retire to your jury room and determine upon your verdict, having in mind that if in the bill of indictment involving the boy Donald Bauman you arrive at a not guilty verdict, you will therefore, on both bills of indictment, have to dispose of the costs of prosecution in accordance with the instructions I have given you.

Will you please return to your jury room.

(End of Charge on costs.)

APPENDIX "G".

MASS. ANN. LAWS ch. 278, § 14 (1956):

> "No prisoner or person under recognizance, acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees or for any charge for subsistence while he was in custody."

MICH. STAT. ANN. tit. 28, § 28.1057 (1948):

> "No prisoner or person under cognizance who shall be acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office, or for any charge of subsistence while he was in custody."

N. Y. CODE OF CRIMINAL PROCEDURE § 719:

> "When the defendant is acquitted, either by the court or by a jury, he must be immediately discharged; and if the court certify, upon its minutes, or the jury find that the prosecution was malicious or without probable cause, the court must order the prosecutor to pay the costs of the proceedings. . . ."

OHIO REV. CODE ANN. § 2947.23 (1953):

> "In all criminal cases . . . the judge or magistrate shall *include in the sentence* the costs of prosecution and render a judgment against the defendant for such costs." (Emphasis added.)

VA. CODE § 19.320 (1960):

"In every criminal case the clerk of the . . . court in which the accused is *convicted* . . . shall, as soon as may be, make up a statement of all the expenses incident to the prosecution . . . and execution for the amount of such expenses shall be issued and proceeded with . . . in favor of the Commonwealth against the accused. . . ."

WASH. REV. CODE ANN. tit. 10, § 10.46.200 (1881):

"No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment is found against him, or for want of prosecution, shall be liable for any costs or fees of any officer or for any charge of subsistence while he is in custody. . . ."

APPENDIX "H".

ORDERS, JUDGMENTS AND DECREES APPEALED FROM.

ORDER OF TRIAL COURT:

"Defendant's motion to be relieved of the costs of prosecution is granted. The verdict, insofar as it imposes upon defendant the penalty of the payment of costs of prosecution, is set aside as being contrary to law. The sentence imposed upon defendant that he pay said costs forthwith or give security to pay the same within ten days and to stand committed until he had complied therewith is vacated." (January 12, 1963)

ORDER OF SUPERIOR COURT OF PENNSYLVANIA:

"Order reversed, sentence reinstated." (December 12, 1963)

ORDER OF SUPREME COURT OF PENNSYLVANIA:

"The order of the Superior Court is affirmed." (July 6, 1964)